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Supreme Court of the United States

OCTOBER TERM, 1936

No. [redacted] 1

THE ATLANTIC REFINING COMPANY,
Appellant,
vs.
COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
OF THE STATE OF VIRGINIA

Brief for Commonwealth of Virginia

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COMMONWEALTH OF VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS
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Brief for Commonwealth of Virginia

OPINION BELOW

The opinion below is officially reported in Volume 165 of the Virginia Reports, beginning at page 492.

JURISDICTIONAL QUESTION

The Commonwealth of Virginia, by her attorneys herein, pursuant to Paragraph 3, Rule 12 of the Rules of this Court, filed a statement opposing the jurisdiction of this Court on the ground that no substantial Federal question was presented by this appeal, to which statement reference is respectfully made.

STATEMENT OF THE CASE

The facts as found by the State Corporation Commission are included in the Record at pp. 45-65. The court below approved these findings, but summarized them (R. pp. 208-210).

The Statement of the Case, in so far as it is confined to facts proved, contained in Brief for Appellant (pp. 2-8), is correct. However, the following facts are worthy of emphasis:

Prior to January 22, 1930, appellant had for six years or more done in its own name a purely interstate business in Virginia without payment or demand of the entrance fee (R. pp. 27-29).

At the time of entrance appellant had done no local business in Virginia and owned no property in Virginia —even property used in its interstate commerce (R. pp. 27, 28, 29).

The State Corporation Commission made certain findings of fact with respect to the nature and extent of the business conducted by appellant's subsidiaries, and by appellant, after entry into the State and payment of the entrance fee complained of. As the validity of the fee must necessarily be determined by the facts as they ex-

isted at the time of its payment, we cannot perceive how facts relating to the business of the subsidiaries or to appellant's own manner of conducting its business after entrance can have any relevancy to the question here involved. However, since such findings of fact have been made, we will briefly refer to them. The Commission found (R. p. 62) that the interstate business of appellant and its intrastate business *after entrance* were capable of practical separation, a finding approved by the court below (R. pp. 209, 213). For example, appellant operates in Virginia local service stations where gasoline and oil are sold to the retail trade. These service stations are in charge of local employees of appellant and are supplied with the products they sell from bulk stations also located in Virginia. Even tires, tubes and accessories are sold at retail at these service stations. The operators of these stations keep books and report to the District Manager, whose office is in Richmond, Virginia. Again, appellant sells gasoline and oils to more than two hundred other service stations in Virginia owned by others. These service stations are supplied for the most part by appellant's bulk stations located in Virginia (R. pp. 33-41).

The invested capital of appellant is approximately one and one-third times greater than its authorized capital (R. p. 31 and Brief for Appellant, p. 6).

Appellant has not been authorized to issue and has not issued any non-par stock. This fact is disclosed by charter of appellant filed as an exhibit in court below, but on account of its length omitted from the Record here by stipulation.

STATUTE INVOLVED

Acts of the General Assembly of Virginia, 1910, Chap. 53, Sec. 38a, p. 79, now Sec. 207 of the Tax Code of Virginia, Michie's Code of Virginia, 1930. For the sake of brevity it is not here again printed since it is found in full in the Record at page 211 and in Brief for Appellant at pages 4 and 5, and is also summarized below.

Virginia Statutes Imposing Taxes on Domestic and Foreign Corporations.

The taxes imposed on domestic and foreign corporations are summarized as follows:

A. Domestic Corporations.

1. Charter Fee (Sec. 206 Tax Code).

   Where maximum authorized capital stock is $50,000, or less, $10;

   Over $50,000 and less than $3,000,000, twenty cents for each $1,000;

   $3,000,000 or more, $600.

2. Annual Registration Fee (Sec. 210 Tax Code).

   Where maximum authorized capital stock is $15,000 or less ..... $ 5.00
   Over $ 15,000 and not over $ 50,000.... 10.00
   Over $ 50,000 and not over $100,000.... 15.00
   Over $100,000 and not over $300,000.... 20.00
   Over $300,000 ..... 25.00

3. Annual Franchise Tax (Sec. 211 Tax Code).

   Where the authorized maximum capital stock is twenty-five thousand dollars, and under, ten dollars;

Over twenty-five thousand dollars, and not in excess of fifty thousand dollars, twenty dollars;

Over fifty thousand dollars, and not in excess of one hundred thousand dollars, forty dollars;

Over one hundred thousand dollars, and not in excess of three hundred thousand dollars, sixty dollars;

Over three hundred thousand dollars, and not in excess of five hundred thousand dollars, one hundred dollars;

Over five hundred thousand dollars, and not in excess of one million dollars, two hundred dollars;

And for all in excess of one million dollars, and not greater than fifty million dollars, an additional sum of ten dollars for each hundred thousand dollars or fraction thereof in excess of one million dollars;

And for all in excess of fifty million dollars, and not greater than one hundred million dollars, the further additional sum of seventy-five dollars for each million dollars, or fraction thereof in excess of fifty million dollars;

And for all in excess of one hundred million dollars, and not greater than one hundred and fifty million dollars, the further additional sum of fifty dollars for each million dollars, or fraction thereof in excess of one hundred million dollars;

And for all in excess of one hundred and fifty million dollars, and not greater than three hundred million dollars, the further additional sum of twenty-five dollars for each million dollars, or fraction thereof in excess of one hundred and fifty million dollars; and for all in excess of three hundred million dollars, the further additional sum of ten dollars for each million dollars,

or fraction thereof in excess of three hundred million dollars.

4. Income Tax (Tax Code, Sections 52-54, inclusive).

Three per cent upon "net income" earned from *domestic* business.

B. Foreign Corporations doing local business.

1. Entrance fee (Sec. 205 Tax Code, Acts 1900, p. 77).

For a company whose maximum capital stock is five thousand dollars or under, twenty-five dollars;

For a company whose maximum capital stock is over five thousand dollars, and not to exceed ten thousand dollars, fifty dollars;

Over ten thousand dollars and not to exceed twenty-five thousand dollars, seventy-five dollars;

Over twenty-five thousand dollars, and not to exceed fifty thousand dollars, one hundred and twenty-five dollars;

Over fifty thousand dollars, and not to exceed one hundred thousand dollars, two hundred dollars;

Over one hundred thousand dollars, and not to exceed three hundred thousand dollars, three hundred and twenty-five dollars;

Over three hundred thousand dollars, and not to exceed five hundred thousand dollars, four hundred and fifty dollars;

Over five hundred thousand dollars, and not to exceed eight hundred thousand dollars, five hundred and seventy-five dollars;

Over eight hundred thousand dollars, and not to exceed one million dollars, seven hundred and fifty dollars;

Over one million dollars, and not to exceed ten million dollars, one thousand dollars;

Over ten million dollars, and not to exceed twenty million dollars, one thousand, two hundred and fifty dollars;

Over twenty million dollars, and not to exceed thirty million dollars, one thousand, five hundred dollars;

Over thirty million dollars, and not to exceed forty million dollars, one thousand, seven hundred and fifty dollars;

Over forty million dollars, and not to exceed fifty million dollars, two thousand dollars;

Over fifty million dollars, and not to exceed sixty million dollars, two thousand, two hundred and fifty dollars;

Over sixty million dollars, and not to exceed seventy million dollars, two thousand, five hundred dollars;

Over seventy million dollars, and not to exceed eighty million dollars, two thousand, seven hundred and fifty dollars;

Over eighty million dollars, and not to exceed ninety million dollars, three thousand dollars;

Over ninety million dollars, five thousand dollars.

2. Annual Registration Fee (Sec. 210 Tax Code).

   Same as domestic corporations.

3. Annual Franchise Tax.

   None.

4. Income Tax (Sections 52-54, inclusive, Tax Code).

   Same as domestic corporations.

In addition to the foregoing, the State imposes a tax upon intangible property of both foreign and domestic

corporations, and the cities, towns and counties impose local taxes on tangible personal property and real estate. The rate is the same upon domestic and foreign corporations in all cases.

A Virginia corporation the same size as appellant (authorized capital one hundred million dollars) is required to pay a charter fee of $600, and *every year* a franchise tax of $8,850 (Sec. 211, Tax Code, *supra*), while appellant is required to pay only an entrance fee of $5,000, and thereafter pays no franchise tax whatever.

QUESTION PRESENTED

Whether a single entrance fee with a maximum limit of $5,000, measured by, but not varying in direct proportion to, its authorized capital stock, required of a foreign corporation (heretofore also engaged in interstate commerce in this and other states) as one of the conditions precedent to its securing the right to do intrastate business in Virginia in corporate capacity, before any such business is done and before the corporation has acquired any property in the State, is arbitrary or unreasonable, or is a tax upon the corporation's property outside the State so as to constitute a taking of property without due process of law, or results in a denial of the equal protection of the laws, or an unlawful burden upon interstate commerce, where the State imposes no annual or other franchise tax upon the corporation after its admission.

SUMMARY OF ARGUMENT

The statute here challenged imposes a fee on a foreign corporation as a condition precedent to obtaining

a certificate of authority to do local business in Virginia. No restrictions are imposed by any Virginia statute on the corporation's activity after entrance, other than is applicable to domestic corporations. No annual franchise tax or any tax on the right to continue to do business is imposed on foreign corporations, though a very substantial annual franchise tax is required of Virginia companies. The privilege or right obtained by the foreign corporation upon being admitted to the State is to engage in the transaction of intrastate business on the same terms as domestic corporations, and to employ *all of its capital stock* in the State if it so desires.

There is an obvious and important distinction between an *entrance fee* imposed upon a foreign corporation as a condition precedent to its right to enter the State and begin to transact an intrastate business therein, and an annual franchise tax, or similar tax, imposed *after it has been admitted,* as a condition that it *shall not be expelled.* Every decision of this Court relied on by appellant involved the application of the statutes to companies already admitted and the payment of the tax was required *in order to avoid expulsion* of said corporations which had built up a business and acquired property rights in the State.

The amount of the entrance fee is not determined by a percentage of its authorized capital stock, but is fixed by the class within which the amount of such stock places it. For illustration,, one classification is corporations with an authorized capital stock of $1,000,000 and not over $10,000,000. There is a maximum fee of $5,000. It is obvious that such a broad basis of classification does not reflect an effort by the State to tax property outside its jurisdiction.

The fee is based upon the sound principle that the size of a corporation is the best criterion to determine or measure the value of the right conferred. Since this right is a perpetual one, the ultimate size of the corporation, rather than its present size, is selected to determine the amount of the entrance fee. The authorized capital stock is the best index of the corporation's ultimate size.

The constitutional validity of the identical statute here challenged was sustained by this Court in *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, in which it was held that the entrance fee imposed is not a tax upon property outside the State and is not arbitrary or unreasonable. Neither that case, nor the principles upon which the decision therein was based, have been overruled.

The entrance fee does not deprive the appellant of the equal protection of the laws. All corporations falling within the same class are required to pay the same fee. This classification has been held by this Court, as above stated, not to be unreasonable or arbitrary. But prior to admission to a state a foreign corporation cannot invoke the benefit of the Equal Protection Clause in relation to intrastate business. It is not entitled to any protection whatsoever with respect thereto.

ARGUMENT

A

The Virginia Entrance Fee in its Operation and Effect as Applied to Appellant Does Not Tax Its Property Beyond the Jurisdiction of the State Nor Unlawfully Burden Its Interstate Commerce.

1. The History, Nature, Operation and Effect of the Challenged Statute.

Since her Constitution of 1902, when the State Corporation Commission was created with the power to issue charters to domestic corporations and licenses to foreign corporations, Virginia has required foreign corporations seeking entrance to do a local business to pay an entrance fee, determined by a classification based upon authorized capital stock, as a condition precedent to securing the right. Acts of Virginia, Extra Session of 1902-3-4, Chap. 148, Sec. 38, page 179.[1]

In 1910 the statute was enacted in its present form and remained unchanged up to the time the fee was paid by appellant.

The Virginia fee is purely an entrance fee, a fee required of a foreign corporation before admission as one

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[1] Indeed such a requirement was made mandatory by the Constitution itself, Article 12, Sec. 157, providing in part as follows:

"Provision shall be made by general laws for the payment of a fee * * * by every foreign corporation upon obtaining a license to do business in this State * * *. No foreign corporation shall have authority to do business * * * until it shall have first obtained from the Commission a license to do business in this State * * *."

of the conditions precedent to the corporation obtaining the *right to do* local business in corporate capacity as distinguished from a tax for the actual doing of business. While cognizant of the greater power that a State may exercise over corporations of its own creation, the enactment here attacked is analogous to the charter fee paid by a domestic corporation. This is the construction adopted by the court below and by the State Corporation Commission (R. pp. 92, 208).[2]

The fee, being payable before entrance to do local business, cannot be measured by property employed in local business in the State, as obviously the corporation can have no property used in this class of business. Looking through form and considering substance, it is manifest that Virginia is not taxing or attempting to tax property beyond her jurisdiction, but, on the contrary, the fee not varying in direct proportion to the capital stock, is in effect imposing a series of flat fees for the privilege of admission, measured by the sizes of the respective corporations applying. Often a tax may be in form a privilege tax, but in reality a tax on property. However, the fee here cannot be considered a property tax at all. It has no connection with property;

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[2] As stated by the court below (R. p. 212), charter fees for domestic corporations are less than entrance fees for foreign corporations, yet the fact that Virginia does not penalize foreign corporations is manifest when it is considered that a domestic corporation of appellant's size would be required to pay an *annual* franchise tax of $8,850 (Acts of Virginia, 1902-3-4, p. 182, as amended, ibid. 1926, p. 904; now, Sec. 211 of Tax Code of Virginia, Michie's Code, 1930), while a foreign corporation is not required to pay this tax or any similar tax.

it would be the same if the corporation were a new one, had sold none of its capital stock and had little or no property. It should not be overlooked that the fee is not for the first year's business, or for that of any number of years. It admits the corporation perpetually, and the right acquired includes the right to employ all or any part of its authorized capital stock in domestic business in Virginia. Its business for the first year or the first few years may be small, but thereafter may be immeasurably increased. Authorized capital[3] is the best index, not necessarily of the present size, but of the ultimate permanent size of the corporation, and permanent size is, before admission, the best standard available to anticipate and measure the value of the franchise conferred by admission. It follows that the fee thus measured has an intimate relation to the value of the privilege or franchise granted.

So, also the fee from its nature does not unlawfully burden interstate commerce. It is not and cannot, as is usual with *annual taxes,* be measured by the amount of local business done, since at the time of entrance into the State no local business has been or can be legally conducted therein; it is, of course, not measured by interstate business conducted in or out of the State, Virginia recognizing that she cannot require a certificate of authority to do purely interstate business therein. This

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[3] If appellant's view of the tax be correct, it would appear that so far as the commerce and due process clauses are concerned the Virginia fee would be equally invalid if measured by *issued* rather than authorized capital. In fact, if measured by issued capital, it would have a far closer connection with property.

characteristic of the Virginia law is strikingly and convincingly brought out in the case of appellant by the admitted fact that it engaged in purely interstate commerce in Virginia for at least six years prior to January 22, 1930 (the date it sought a certificate of authority to do intrastate business), and its right to conduct such business was never challenged. No attempt was made to force appellant to obtain a certificate of authority, nor was any claim asserted that appellant was subject to any charge or fee for the privilege of conducting its interstate business in Virginia.

Thus it appears the Virginia exaction fully meets the letter and the spirit of the conditions recently laid down by this Court (although the subject of the tax is not the same) in *Cooney* v. *Mountain States Tel. & Tel Co.*, (1935) 294 U. S. 384, 393:

> "* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. * * *"

It is clear, therefore, that the entrance fee here challenged does not tax property beyond the jurisdiction of the State, or unlawfully burden interstate commerce, or arbitrarily and unreasonably discriminate between foreign corporations.

2. THE VALIDITY OF THE IDENTICAL STATUTE, APPLIED IN SIMILAR CIRCUMSTANCES, HAS BEEN UPHELD IN GENERAL RAILWAY SIGNAL CO. V. VIRGINIA, 246 U. S. 500, AND NEITHER THIS CASE NOR THE PRINCIPLES UPON WHICH THE DECISION THEREIN IS BASED HAVE BEEN OVERRULED.

The Virginia entrance fee was not assailed until 1916 when it was upheld by the court below. *General Railway Signal Co.* v. *Commonwealth,* 118 Virginia 301. The decision was affirmed by this Court in 1918. *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500. The fee again came before this Court in 1928 in *Western Gas Construction Co.* v. *Virginia* (Mem.) 276 U. S. 597, wherein this Court affirmed the State Supreme Court (147 Va. 235), upon the authority of *General Railway Signal Co.* v. *Virginia, supra.*

The court below took the view in this case (R. p. 212) that the validity of the fee was sustained both by that court and by this Court in the *Western Gas Construction Company Case, supra.*

That Virginia has relied implicitly on these decisions of this Court is manifest from the fact the statute now challenged is the identical statute reviewed in the *Signal Company* and *Western Gas Construction Company Cases,*[4] and similarly applied.

Appellant contends that the only objection to the statute considered in the *Signal Company Case* was that

[4] The statute was amended in 1936 for the *sole* purpose of requiring a minimum fee of $50 of certain corporations all of whose stock is owned by the United States of America (Acts of Virginia, 1936, p. 1).

the tax was a burden on interstate commerce, and that the question of due process was not raised or considered. The argument has little merit, for it is respectfully suggested that, if this Court had been of opinion in that case that the effect of the fee as there applied was to reach the total capital of the corporation employed in interstate and intrastate business in other States, it would have declared it to be invalid under the Commerce Clause. Certainly in *Looney* v. *Crane,* 242 U. S. 178, and the other cases cited and distinguished by this Court in the *Signal Company Case,* both clauses were invoked. Furthermore, this Court has uniformly applied the same test in determining the validity of statutes imposing franchise taxes on foreign corporations, namely, whether the tax is intended as, or is in effect, a tax upon property outside the State, and when found so to be, the tax has been held to violate the due process clause and also the commerce clause. The tax here involved has, therefore, necessarily been subjected to this test and found not to be a tax upon the property of a foreign corporation.

It is well established that statutes of this nature violate the due process and commerce clauses when the tax thereby imposed is designed as, or is in effect, a tax upon property of the corporation outside the State, or when the tax is arbitrary or unreasonable. As before stated, this identical statute has been subjected to this test by this Court in the *General Railway Signal Company Case,* and found to be not a tax upon such property, and not arbitrary or unreasonable.

Appellant contends, however, that, although the *Signal Company Case* has not been overruled, it was

grounded on principles which this Court has since overruled by the *Cudahy Packing Company Case,* and therefore the *Signal Company Case* should now likewise be overruled to conform to the alleged new principles. A review of these two cases will disclose the unsoundness of this argument.

GENERAL RAILWAY SIGNAL COMPANY v. VIRGINIA, 246 U. S. 500.

Before discussing this case, the circumstances under which it was decided should be considered. It was argued March 11, 1918, and decided April 15 of that year. Three months before it was argued, December 10, 1917, *Looney* v. *Crane, supra,* was decided, after having first been argued in May, 1917, and, after being restored to the docket, reargued on November 6, 1917. On March 4, 1918, *Cheney Bros.* v. *Massachusetts,* 246 U. S. 147; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, and *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146, were decided. These cases all deal with the validity of annual franchise taxes based solely on authorized capital stock of foreign corporations. They were decided exactly one week before the *General Railway Signal Company Case* was argued. In the *International Paper Company Case* the opinion says: "Our last decision on the subject was given during the present term in *Looney* v. *Crane.* The case was orally argued a second time at our request and was much considered." The opinion also summarized the principles to be applied in testing the validity of statutes of this type, as follows (246 U. S. 141-142):

"1. The power of a state to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister state—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital

stock of the corporation represents all its business of every class, and all its property, wherever located.

"6. When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the state."

One week after enunciating the above principles, and having them fresh in mind, this Court came to consider the validity of the statute now again brought here by this appeal. In the *General Railway Signal Co.* v. *Virginia Case,* a New York corporation, with an authorized capital stock of $5,000,000, was fined by the Virginia State Corporation Commission for doing business within the State without first obtaining the required certificate of authority. The only business transacted or apparently contemplated was the installation of certain electric signals for the Southern Railway Company. The Signal Company had previously made and performed similar contracts, the total consideration for all of them over a period of about three years being $214,040. While it was necessary to employ labor in installing the apparatus, it was claimed that the material was sold in interstate commerce, and that the company was not transacting a local business in Virginia, which contention this Court rejected. It did not appear, however, that the corporation was employing a very considerable part of its capital stock in its intrastate business. The entrance fee imposed under the statute (the same here under consideration), was $1,000, which is the fee required of corpora-

tions where the authorized capital stock is between one million and ten million dollars. The Signal Company attacked the validity of the entrance fee as a burden on interstate commerce. In sustaining its validity, this Court found it to be not arbitrary or unreasonable, and not within the prohibitions established by *Looney* v. *Crane, supra; International Paper Co.* v. *Massachusetts, supra,* and *Locomobile Co.* v. *Massachusetts, supra,* which were referred to in the opinion as not applicable.

This Court unanimously held, therefore, that the statute did not "tax property belonging to a foreign corporation and neither located nor used within the confines of the State," in violation of the rule above quoted from *International Paper Co.* v. *Massachusetts,* and that the entrance fee was not a burden on interstate commerce. On the contrary it was decided that the question of the validity of the statute was controlled by the principles enunciated in four other cases, *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S. 350; *Kansas City, etc., R. Co.* v. *Botkin,* 240 U. S. 227, and *Kansas City, etc., R. Co.* v. *Stiles,* 242 U. S. 111.

A consideration of these four cases will render obvious the true principles upon which the Signal Company decision was based, and they will be briefly reviewed.

Kansas City, etc., R. Co. v. *Stiles,* 242 U. S. 111.

In this case an Alabama statute authorized two or more connecting railroad corporations of different states to consolidate and, after executing and filing certain required papers, to become a consolidated Alabama corpora-

tion. Tennessee and Mississippi enacted similar statutes. Three companies, one of each of these states, filed the necessary papers and became an Alabama Consolidated Corporation. The case before this Court was an attack upon the validity of an annual franchise tax graduated upon paid up capital stock. Since the statute permitting the consolidation necessarily contemplated that part of the property represented by the capital stock would be outside the state, the company contended that the tax was, in effect, laid on such property, and was a direct burden on interstate commerce. In rejecting this objection, this was said (242 U. S. at p. 117):

> "The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama."

And the Court held that the tax was not in any sense a property tax, but was a franchise tax which the state had the power to levy, and that a tax of this nature may properly be measured by capital stock even though same represented, in part, "property without the taxing power of the state."

The citation of the foregoing case in support of the opinion in *General Railway Signal Co.* v. *Virginia* constitutes a clear recognition of the analogy between a pure entrance fee and a franchise tax imposed by a state on corporations of its own creation. From the

standpoint of transacting local business, a foreign corporation may be said to have no existence in Virginia prior to admission, and the entrance fee may be regarded as a tax upon the right of the foreign corporation to come into existence for this purpose in Virginia. Clearly the same measure employed to determine the amount of a franchise tax on a domestic corporation may be used as a measure of an entrance fee.

Kansas City, etc., R. Co. v. *Botkin*, 240 U. S. 227.

This case involved the validity of an annual fee imposed by the state of Kansas upon domestic corporations. The fee was graduated according to paid up capital stock increasing until the maximum of $2,500 was reached. Its validity was challenged upon the ground "that the tax is a direct burden upon interstate commerce and is laid upon property outside the state." This Court held the fee "to be simply a tax on the privilege of being a corporation,—on the primary corporate franchise granted by the state" and said that "The authority of the state to tax this privilege, or franchise, has always been recognized, and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power * * *. The selected measure may appear to be simply a matter of convenience in computation, and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 83)

to emphasize the necessary caution that 'every case involving the validity of a tax must be decided upon its own facts;' and if the tax purports to be laid upon a subject within the taxing power of the state, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

Concluding, the Court said:

> "For similar reasons, the contention cannot be sustained that the tax was one on property beyond the jurisdiction of the state. Undoubtedly, a tax may be in form a privilege tax and yet, in substance, may be a tax on property. *But the present tax cannot be regarded as a property tax at all* (Italics supplied).

These principles obviously were held in *Signal Co.* v. *Virginia* to be applicable to the Virginia Entrance fee.

Southwestern R. Co. v. *Arkansas,* 235 U. S. 350.

In this case an annual franchise tax was imposed by Arkansas upon the privilege of a foreign railroad corporation to do an intrastate business. The tax was measured by the proportion of the company's capital stock represented by property owned and used in the transaction of business in the state. The validity of the tax was assailed on the ground that the company's property in the state was used in both interstate and intrastate commerce and the tax was a direct burden upon the former.

The State Supreme Court had upheld the tax as being levied upon the right of the Missouri Corporation *to exist as a corporation in Arkansas,* concerning which this Court said:

> "We therefore accept the construction of Act No. 112 that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state * * *."

The validity of the tax was sustained.

The close analogy between a franchise tax on a domestic corporation's right to exist, and an entrance fee permitting a foreign corporation *to exist in the state,* is clearly indicated in the opinion in this case.

The analogy between a charter fee and an entrance fee is even more close. The right of a state to measure the charter fee by authorized capital has never been questioned.

Baltic Mining Co. v. *Massachusetts,* 231 U. S. 68.

This is the case which appellant contends established the principle that the maximum limit characteristic of a state franchise tax measured by authorized capital saves its constitutionality. We can find no such principle laid down in the opinion. This feature of the tax is merely mentioned once. It is not in any manner emphasized or elaborated upon, but is treated in the opinion as one of the numerous facts to be considered in applying the appropriate legal principles to determine whether

property without the state is being subjected to the tax.

The Massachusetts statute imposed upon foreign corporations an annual excise tax of one-fiftieth of one per cent of its authorized capital stock, which the Supreme Court of Massachusetts construed as not a tax upon property, but "for the commodity or privilege of having an establishment in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here." Imposition of the tax was objected to on the same three grounds raised by appellant to the Virginia Entrance fee,—that the tax was a direct burden on interstate commerce and violated the due process and equal protection clauses of the Constitution.

The court took special care to emphasize the principle that "every case involving the validity of a tax must be decided upon its own facts." Emphasis is also laid upon the fact that the tax was not applicable to foreign corporations "whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation." Consideration was also given to the fact that the assets of the corporation exceeded about five times the authorized capital stock. The only reference to the maximum limit feature is contained in the following quotation from the opinion (231 U. S. 87):

> "* * * While the tax is imposed by taking a percentage of the authorized capital, the agreed facts

> show that the authorized capital is only a part of the capital of the corporations, respectively. In the *Baltic Mining Company Case,* the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the *White Dental Company Case* the authorized capital is $1,000,000, while the assets aggregate $5,711,718.20. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, *it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed* * * *" (Italics supplied).

The language italicized above, which, standing alone, might seem to authorize the State to *"impose"* a tax upon property beyond its jurisdiction, but which was clearly intended to mean only that such a tax may, in proper cases, *be measured* by such property, seems to have resulted in some confusion in the interpretation of the opinion, and it obviously was this, and not the "maximum limit" feature which called forth the disapproval in *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, which was contained in the following quotation from the *Cudahy Packing Company Case, supra:*

> "It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the guise of regulating

> or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved. *Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small. This view did not harmonize with the principles approved by *Looney* v. *Crane Co.*, and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

This language is relied on by appellant as overruling the *Baltic Case* after the decision in the *Signal Company Case*, but the same thought had been previously expressed in *Looney* v. *Crane*, *supra* (decided four months before the *Signal Company Case*), where, after referring to several leading cases, including the *Baltic Case*, this is said (245 U. S. 189-190):

> "* * * The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but, on the contrary, in explicit terms declared that they did not conflict with them, and that they proceeded upon conditions peculiar to the particular cases.

"* * * In the first place, it is apparent in each of the cases that, as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether, by their necessary operation and effect, they were repugnant to the Constitution in the particulars stated, and this inquiry, it was expressly pointed out, was to be governed by the rule long ago announced in *Postal Teleg. Cable Co.* v. *Adams,* 155 U. S. 688, 698, that 'the substance and not the shadow, determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. *It is thus manifest on the face of all of the cases that they in no way sustained the assumption that, because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution*" (Italics supplied).

The opinion in *Cudahy Packing Co.* v. *Hinkle,* containing the quotation hereinabove referring to the *Baltic Case,* was written by Mr. Justice McReynolds, as was

also the opinion in *General Railway Signal Co.* v. *Virginia,* and it can hardly be argued that at the time he wrote the latter opinion he regarded the *Baltic Case* as "lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sustained if relatively small." There is nothing to justify appellant's argument that the Virginia entrance fee was sustained under any such misconception of the *Baltic Case.*

While the characteristic of a reasonable maximum in a tax based on capital stock has been generally considered by this Court as a material consideration in determining whether the tax is laid upon property without the State, it has never been held to constitute a *test* of validity. In *International Paper Co.* v. *Massachusetts, supra,* this was said (246 U. S. 145):

> "In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Min. Co.* v. *Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney* v. *Crane Co.* True, the tax sustained in *Baltic Min. Co.* v. *Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax, which, as shown in that and other cases was a *material factor* in the decision * * *."

Baltic Mining Co. v. *Massachusetts,* therefore, clearly did not establish a principle that the maximum feature of a tax of this nature was a *test* of its validity, but merely that it was a "material factor" to be given con-

sideration along with other material facts in that case. This had been held to be the true construction of the *Baltic Case* by the opinion in *International Paper Co.* v. *Massachusetts,* above quoted from before the decision of *General Railway Signal Co.* v. *Virginia.* This Court has never held that such maximum feature is not to be given material consideration. *Cudahy Packing Co.* v. *Hinkle, supra,* does not so hold. We will now discuss this case.

Cudahy Packing Co. v. *Hinkle,* 278 U. S. 460.

In 1916 the Cudahy Packing Company, a Maine corporation, qualified to do a local business in Washington and thereafter "began to carry on closely associated interstate and intrastate business" in that State. In 1925 amendments of the taxing laws required foreign corporations to pay an increased filing fee in proportion to any increase in its authorized capital stock, and also an annual license fee, graduated according to its authorized capital stock, each having a limitation of $3,000. In 1927 the increased filing fee and the license fee for that year were demanded of the Company, payment of which was resisted. The Company owned only $40,000 worth of property in the State, and out of the Company's annual gross sales of $231,750,000, less than $650,000 represented intrastate business in Washington. When the Company entered the State in 1916 its authorized capital stock was $20,000,000, but had been increased to $45,000,000.

It thus appears that after the Company had complied with the 1916 requirements to engage in intrastate busi-

ness, this additional filing fee and license fee was imposed, based solely on the Company's authorized capital stock, though obviously other and more reasonable standards for measurement of the fees were available.

This Court held that applied to these facts and circumstances the taxes imposed were not unlike those in *Looney* v. *Crane Co., supra,* and that "Unless saved by the $3,000 limitation the Washington enactments are subject to the constitutional objections pointed out in *Looney* v. *Crane Co.* and must be denied effect." The opinion then refers to *Baltic Min. Co.* v. *Massachusetts,* and points out that under the particular facts in that case, where the corporate assets were four times the authorized capital and the statute carried a $2,000 limitation of the tax, the Court concluded *"that no direct substantial burden was imposed upon interstate commerce and that property beyond the State was not taxed."* The opinion further emphasizes what had previously been said in *Looney* v. *Crane Co., supra,* (before the decision in *Signal Co.* v. *Virginia*), that the *Baltic Case,* and other cases referred to, "in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution." (*Looney* v. *Crane,* 245 U. S. 178, 190). In the *Cudahy Packing Co. Case* the above principle is emphasized by the express statement that "*Baltic Mining Co.* v. *Massachusetts* had sometimes been regarded as lending support to the theory that a tax which really burdens interstate commerce and reaches property beyond the State may be sus-

tained if relatively small. *This view did not harmonize with the principles approved by Looney* v. *Crane Co.,* and was expressly disapproved by *Alpha Portland Cement Co.* v. *Massachusetts.*"

It thus appears from the opinion in the *Cudahy Packing Co. Case* that it was in *Looney* v. *Crane Co.* that the principle was first clearly stated that property beyond the State may not be taxed in any degree. The *Cudahy Case* also clearly states that *Baltic Min. Co.* v. *Massachusetts* did not hold any such principle, but that in that case "the Court concluded that no direct substantial burden was imposed upon interstate commerce, and that *property beyond the State was not taxed.*"

It is also clear from the two opinions above referred to that this Court never did enunciate a doctrine that property beyond the State might be taxed if there was a limitation on the tax. Since there never was any such rule, obviously the *Cudahy Packing Company Case* could not overrule it, though it did further clear up the misconceptions which had been entertained that the *Baltic Mining Company Case* promulgated a doctrine of that kind.

Nor does *Cudahy Packing Co.* v. *Hinkle* in any sense intimate that *in determining whether a State tax does reach property beyond the State,* a factor not to be given material consideration is the fact that the tax is subject to a reasonable limitation. On the contrary, the opinion shows that this feature of the tax *was considered in that case,* but was not sufficient to save its validity, *because the tax there did reach property beyond the State,* and the limitation was legally immaterial.

Appellant contends that the increased filing fee enacted after the Cudahy Packing Company's entrance into

Washington should be considered separately from the annual license fee, and that the filing fee was, upon principle, the same as Virginia's entrance fee. But this Court has in cases of this nature always considered together all the taxes imposed by a State upon a foreign corporation, in order to determine the purpose and effect of any one of them, and in *Looney* v. *Crane Co.*, where there was an annual franchise tax and a permit fee this Court expressly held them to be interdependent, and that the two must stand or fall together.

Comparison of the Virginia Entrance Fee With the Washington Filing and License Fees Involved in Cudahy Packing Co. v. Hinkle.

In considering the question whether the Virginia entrance fee is intended as or is in effect a tax upon property outside the State, the groups into which the corporations are classified to determine the amount of the fee is material. After the capital stock of $1,000,000 is reached, the first group embraces corporations with authorized capital stock ranging from over one million to ten million dollars, for which the fee is $1,000, the next group is from ten to twenty million, the next from twenty to thirty million and so on in groups, each covering a range of ten million dollars, until the last group, including all corporations with authorized capital stock over ninety million dollars, is reached, in which group the entrance fee is fixed at $5,000.

The Washington statutes, however, which were before this Court, in *Cudahy Packing Co.* v. *Hinkle,* required a filing fee of $750 for a foreign corporation

whose authorized capital stock was between one and two million dollars, and $10 additional for each $1,000,000, or major fraction thereof, of capital stock in excess of $2,000,000, with a limitation, however, of $3,000. An *annual* license fee was also required to be paid amounting to $150 where the authorized capital stock was between one and two million dollars, "and $10 for each $1,000,000, or fraction thereof, of capital stock in excess of $2,000,000," with a limitation on the annual fee of $3,000.

The distinction between the principles underlying these exactions from those applicable to the Virginia entrance fee is obvious. In Virginia the base of classification is a difference of ten million dollars of capital stock, while in Washington the difference between the classes was one million. In Virginia there is no annual license or franchise tax, while in Washington there was a substantial one based upon the same variation in capital stock as was applied to the filing fee.

In Washington, a corporation entering the state would have subjected itself in advance to this annual tax, based on its authorized capital stock, though after entrance other reasonable standards of measurement of such a tax would be available, while in Virginia a corporation entering does not encounter or assume this future burden, or any annual privilege tax.

Other Cases Cited by Appellant Decided Prior to General Railway Signal Co. v. Virginia

In its approach to a discussion of *Cudahy Packing Co.* v. *Hinkle* appellant's brief contains an elaborate discus-

sion and analysis of many decisions of this Court involving State exactions of foreign corporations, beginning with *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, and including *Pullman Co.* v. *Kansas,* 216 U. S. 56; *Ludwig* v. *Western Union Tel. Co.,* 216 U. S. 146; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Locomobile Co.* v. *Massachusetts,* 246 U. S. 146; *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203. In view of the fact that all of these cases, with the exception of the *Alpha Portland Cement Co.* v. *Massachusetts,*[5] were decided prior to *General Railway Signal Co.* v. *Virginia,* a detailed discussion of them would only serve to unduly lengthen this brief. Suffice it to say that the Court in its opinions in these cases time and again adverted to the principle that each case involving the validity of a tax must be decided on its own facts.

Peculiarly apposite is this statement from the opinion in *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 140, 141:

> "Cases involving the validity of state legislation of this character often have been before this court. The statutes considered have differed greatly, as have the circumstances in which they were applied, and the questions presented have varied accordingly. In disposing of these questions there has been at times some diversity of opinion among the members of the court and some of the decisions have not been

[5] Since this case involved an annual excise imposed on a foreign corporation for the privilege of doing an *interstate* business, it is admittedly not in point.

> in full accord with others. But the general principles which govern have come to be so well established as no longer to be open to controversy."

Apposite, because in no case decided by this Court, except the cases involving the Virginia fee, has it ever had occasion to pass on a similar tax imposed under similar circumstances.

It has frequently been argued in this Court, as appellant now argues, in cases dealing with the power of the States to impose kindred exactions on foreign corporations, that subsequent decisions have overruled previous ones. The special facts here present make strikingly pertinent the language of Mr. Chief Justice White in disposing of this contention in *Looney* v. *Crane Co., supra,* (the principal authority for *Cudahy Packing Co.* v. *Hinkle).* After referring to *Baltic Mining Co.* v. *Massachusetts, supra,* and other cases, he said (245 U. S. 189):

> "* * * The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases."

3. THE VIRGINIA ENTRANCE FEE AS HERE APPLIED DOES NOT IMPOSE UNCONSTITUTIONAL CONDITIONS UPON THE ENTRANCE OF A FOREIGN CORPORATION.

The doctrine that a State may not require a foreign corporation as a condition precedent to entrance to yield

or bargain away rights guaranteed under the Federal Constitution is not new. It was firmly imbedded in the decisions of this Court when *General Railway Signal Co.* v. *Virginia, supra,* was decided, as appears from a review of decisions in *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494, and *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583. But it is consistently held that with the State's power to exclude altogether, *Bank of Augusta* v. *Earle,* 13 Peter 519, *Railway Express Agency* v. *Virginia,* 282 U. S. 440, the deprivation of constitutional rights must be plain to render the statute invalid.

> "If the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule, but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction." Kansas City, F. S. & M. Ry. Co. v. Botkin, 240 U. S. 227.

It will not be denied that the subject here is within the taxing power of the State—the *right* to do local business in corporate form, as distinguished from the actual carrying on of business. The right granted by Virginia of itself has no relation to the volume of business actually transacted, and to require a measure for the price for this *right* to be based on what is actually done within the State would represent a failure to distinguish between the right to do and the actual doing. Such a holding would have the effect of requiring Virginia to forfeit to a large degree its power to exclude, inasmuch as the corporation must be allowed to enter and do a local business before such a measure can be applied and the tax collected.

In the cases that have been before this Court involving invalid State requirements of foreign corporations the corporation has been compelled to submit to a condition to be fulfilled *after* entrance, or to submit to a condition imposed by a statute enacted after the corporation had been admitted. *Terral* v. *Burke Construction Co.*, 257 U. S. 529; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1; *Southern Railway Co.* v. *Greene*, 216 U. S. 400; *Looney* v. *Crane*, 245 U. S. 178; *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 593; *Cudahy Packing Co.* v. *Hinkle*, 278 U. S. 460.

The Virginia statute, on the other hand, as applied here, requires the foreign corporation to submit to no condition after entrance—it stands on the same footing as domestic corporations (except the latter are required to pay an annual franchise tax). The act of entrance is a finality and a reasonable price is charged. As has been stated, the fee is analogous in many respects to the charter fee of a domestic corporation for the "right to be" a corporation, and this was obviously the view of the fee taken by this Court when it cited in support of its decision in *General Railway Signal Co.* v. *Virginia*, *supra*, the cases hereinbefore discussed.

The nature, operation and effect of the Virginia condition precedent to entrance vary materially from the annual charges and conditions imposed after entrance which have heretofore been held invalid by this Court. The distinction pressed has been clearly recognized by this Court and the appellate courts of Virginia, New York and Illinois. *People v. Laughman*, 249 N. Y. 369; *St. Louis-Southwestern Ry. Co.* v. *Stratton*, 353 Ill. 273.

See *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494; *People* v. *Latrobe*, 279 U. S. 421. *Atlantic Refining Co.* v. *Virginia*, 165 Va. 492.

Virginia is not contending, and emphatically does not desire to be understood as contending that there is no limitation to the exaction that may be demanded of a foreign corporation for entrance therein. But the purpose of a statute is of controlling significance. If a State under the guise of an alleged entrance fee should attempt to tax property beyond its jurisdiction or to unlawfully burden interstate commerce, its effort would be futile. This Court will not be bound by the mere wording of a State statute imposing a tax, nor allow constitutional provisions to be evaded by legislation which seeks to accomplish indirectly that which cannot be done directly. It will look to the purpose of an act from a consideration of its history and surrounding circumstances. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620. Compare *Educational Film Corp.* v. *Ward*, 282 U. S. 379.

But appellant does not attribute any covert motive to Virginia. Indeed, at this late date it may be doubted whether anyone would have the temerity to argue that this fee, which has been in effect for more than thirty years, with a most unusual legislative and judicial history, represents a deliberate effort on the part of the State to pervert its powers. Virginia has not yielded to the lure, as many States have, of amending this ancient statute for the purpose of obtaining a larger revenue from foreign corporations, nor has it imposed an annual charge on them for the privilege of continuing to do business in the State.

The announcement relied on by appellant in the Restatement of the Law of Conflict of Laws (Sec. 175, final draft 1934) is less authoritative than it seems. The proceedings in The American Law Institute, Vol. V, pp. 237, 239, show that this section is only a statement of common law principles and is not a restatement of constitutional law. The discussion of these constitutional questions is not complete and in the words of Mr. Morawetz, speaking of this section (p. 238):

> "* * * There are a great many qualifications of these doctrines, especially those qualifications made by the Supreme Court of the United States, which are not referred to and cannot be referred to in this Restatement. Something should go in, however—there should be a warning to look forward."

The cases from State courts cited by appellant will not be discussed in detail. Collectively it may be said that not one of them is concerned with such an exaction as Virginia's, applied in similar circumstances. In fact, we have been able to discover no reported decision, State or Federal (and counsel for appellant have cited none), other than *General Railway Signal Co.* v. *Virginia, supra,* and *Western Gas Construction Co.* v. *Virginia, supra,* dealing with such a charge. The only State decisions cited in the text passing on single charges are *Badger* v. *Crockett,* 70 Utah, 265, an entrance fee of 25 cents per $1,000 of authorized capital without a limit; *Chicago, etc., Railroad Co.* v. *Kansas,* 89 Mont. 1, an additional fee, not an entrance fee, imposed after the original fee had been paid, measured by authorized capital and without limit; *State* v. *Liggett & Myers Tobacco Co.,* 171

S. C. 511, a fee without limit based on authorized capital stock retroactively imposed on a corporation long doing business in South Carolina.

Appellant argues that this Court has never made any distinction between a fee imposed at the time of entrance, and taxes, both single and annual, exacted after entrance. The obvious answer to this argument is that only in the cases involving the Virginia fee has it ever been necessary to make the distinction and the decisions show that in those cases it was made. But the answer on fundamental principle is that the argument ignores the true *subject* of the tax and the purpose, operation and effect of the various statutes reviewed.

Virginia, therefore, respectfully submits that by this reasonable charge she neither attempts to nor does tax property beyond her jurisdiction or unlawfully burden interstate commerce, and that, therefore, appellant is deprived of no constitutional right.

B

A Foreign Corporation, Before Admission to a State, is not Entitled to the Equal Protection of the Law, but in any Event the Virginia Entrance Fee does not Arbitrarily Discriminate as Between Foreign Corporations, but is a Reasonable Requirement Bearing a Substantial Relation to the Right Granted.

Payment of the fee is a condition precedent to admission to the State. Until it is paid, a foreign corporation is not within the jurisdiction of Virginia and, therefore, not entitled to the equal protection of the laws. *Pembina Consol. Silver Min., etc., Co.* v. *Pennsylvania,* 125 U. S. 189; *Blake* v. *McClung,* 172 U. S. 261. Compare *Han-*

over Fire Insurance Co. v. *Harding,* 272 U. S. 494; *People* v. *Latrobe,* 279 U. S. 421; *Southern Railway Co.* v. *Greene,* 216 U. S. 400.

As admitted by appellant, this Court has never held that a foreign corporation, before admission to a State, is entitled to the equal protection of the laws. To so hold would be to deny the power of the State to absolutely exclude, by compelling the State to treat a foreign corporation before admission as if it had already been admitted. Assuming that it is settled that foreign corporations, once admitted, are entitled to equal protection with domestic corporations, the argument of appellant followed to its logical conclusion means that a State may not impose any condition precedent on a foreign corporation's admission that is not equally applicable to domestic corporations, a development of the doctrine of unconstitutional conditions never before advanced.

But even if appellant were entitled to the equal protection of the laws, it is clear that every foreign corporation in its class is treated alike under the Virginia statute. Admittedly Virginia may charge a foreign corporation a fee for the *right to do* local business, and it has never been denied that this fee may be demanded before entrance. Having this power, the State has chosen to exercise it. Manifestly the yardsticks available for the measure of such a tax are few. It, of course, cannot be measured by local business done or by property used in such business. Obviously, a single flat tax imposed alike on all corporations, regardless of size, would be infinitely more unreasonable and arbitrary. Virginia has, therefore, adopted the size of the corpora-

tion as the best available standard by which to value the right conferred. A large corporation, like appellant, with its oil wells and refineries, even though located outside the state, is thereby enabled to conduct a much larger volume of intrastate business in Virginia than a smaller company, and the privilege of conducting same is of more value to it than to a smaller company. It is submitted that under all the circumstances the measurement of the entrance fee by the size of the corporation being admitted is entirely reasonable.

Air-Way Electric Appliance Corp. v. *Day*, 266 U. S. 71, is relied upon by appellant. There the corporation had already obtained a certificate of admission to do business in Ohio, had paid the initial fee, and was, therefore, entitled to equal protection. It was then called upon to pay an annual fee for the privilege of continuing to exercise its franchise in Ohio, based upon the total authorized non-par shares represented by property owned and used and business transacted in the State. Only a small part of the authorized shares had been issued. Thus was involved an annual charge for the privilege of doing business, and it was held that authorized non-par shares held no relation to the privilege conferred and was not a reasonable measure of such a fee. Obviously an annual tax for the privilege of doing business imposed at the end of each year is susceptible of much more precise measurement and should be controlled by entirely different factors than a single entrance fee imposed for obtaining only the right to do business, and before the corporation has done any such business or acquired any property in the State.

This Court has not held that a charge against a foreign corporation must be measured by the value of the privilege for which it is imposed, but that some relation to such value is a reasonable requirement. *Air-Way Electric Appliance Corp.* v. *Day, supra; People* v. *Latrobe, supra.* Necessarily, from the nature of the charge, the Virginia fee must be to some extent arbitrarily fixed, but it is submitted that, for reasons heretofore stated, under all the circumstances it bears a substantial relation to the privilege conferred and is a reasonable requirement.

C

The Legislative Policy is Not in Issue

Appellant suggests that Virginia should adopt a different policy of taxing foreign corporations and adds an appendix illustrating methods which some other States have followed (Brief, pp. 70-72, 76-84). Whatever may be the merits of the Virginia system, it is sufficient to say that the United States Constitution does not require a State to adopt the best possible method of taxation. *People* v. *Latrobe, supra.* Appellant seems to contend that a foreign corporation should have the privilege of entering only a part of its capital stock. Under the privilege conferred upon entrance into Virginia, the corporation is not split up, but is admitted as a whole, and may, if it desires, employ all of its authorized capital stock in transacting an intrastate business.

As has been pointed out, Virginia is by its Constitution committed to the requirement of an entrance fee, and this statute has been in effect for more than thirty years. Doubtless more revenue could be obtained from

foreign corporations by the imposition of an additional annual franchise tax, but Virginia has demonstrated her lack of hostility to such corporations by allowing to remain unchanged this statute which has been sustained by her own courts and by this Court.

CONCLUSION

It is respectfully asserted that the entrance fee here challenged, in the light of all the facts and circumstances represents a valid exercise of the power of the State for a proper purpose, and that the decision of the court below should be affirmed.

Respectfully submitted,

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